Filed 8/14/19 In re T.W. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re T.W., a Person Coming Under the Juvenile Court Law.	B295013 (Los Angeles County Super. Ct. No. CK93732)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.D., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Akemi Arakaki and D. Brett Bianco, Judges. Conditionally reversed and remanded with directions.

Caitlin Christian, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

D.D. (Mother) appeals from the juvenile court's order terminating her parental rights to then 19-month-old T.W. under Welfare and Institutions Code section 366.26.[1] Mother's only contention on appeal is that the Los Angeles County Department of Children and Family Services (the Department) and the juvenile court failed to comply with the inquiry and notice provisions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; ICWA). Mother argues the Department failed to investigate whether Mother or presumed father J.W. (Father) had American Indian ancestry and to provide adequate notice to potential tribes. The Department concedes its investigation was inadequate, and we agree. However, the Department contends there was not sufficient information to trigger ICWA's notice provisions and urges us conditionally to affirm the juvenile court's order.

After Mother appealed, the juvenile court issued an order directing the Department to interview known relatives of

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

Mother and Father with regard to family ancestry and affiliation with the Cherokee and any other American Indian tribe. The court also ordered the Department to prepare a detailed report on its investigation and to determine whether notice to any tribes was required.

We conditionally reverse the order terminating Mother's parental rights and remand the matter to allow the Department and the juvenile court to remedy the violation of ICWA and California law.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Referral*

In May 2017 the Department received a referral from a caller who indicated Mother had given birth to T.W. two days earlier, Mother had a history of mental illness and was not taking her prescribed medication, Mother had four other children who had been removed from her care because of Mother's physical abuse, and Father also was believed to have mental health issues.

B. *The Petition and Detention*

On June 1, 2017 the Department filed a section 300 petition on behalf of T.W. The petition alleged Mother endangered T.W.'s physical health and safety and placed him at risk of harm because of Mother's mental and emotional problems, prior involuntary hospitalization for her psychiatric condition, and failure to take her prescribed psychotropic medication (count b-1). The petition also alleged Mother had a history of substance abuse and was currently abusing

marijuana, rendering her unable to supervise and care for T.W. (count b-2). Further, on prior occasions Mother physically abused T.W.'s siblings, endangering the physical health, safety, and well-being of T.W. (count j-1). The petition also alleged Father had a history of substance abuse and was currently abusing alcohol (count b-4).[2]

C. *The ICWA Investigation*

On June 1, 2017 Mother and Father filed parental notification of Indian status forms. Father checked the box stating he "may have Indian ancestry," and listed the Cherokee tribe. Mother stated T.W. "is or may be a member of, or eligible for membership" in the Cherokee tribe. Father stated his paternal family was originally from South Dakota. Based on this information, at the June 1, 2017 detention hearing the juvenile court[3] ordered the Department to investigate the parents' American Indian ancestry and send out any required notices.

The August 1, 2017 jurisdiction and disposition report stated one of Father's sisters reported she had no information on her American Indian ancestry. The sister stated she did not "have any information as its [*sic*] far back and no one is alive to provide the information." Father noted his parents were deceased, but he was close to his sisters Pamela and Regina,

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[2] The petition also alleged in count b-3 that Mother had physically abused T.W.'s siblings and in count b-5 that Father had mental health issues and failed to take his prescribed psychotropic medications. These allegations were stricken from the amended petition.

[3] Judge Akemi Arakaki.

who provided him a "support system." He also stated he had another sister, Kathy, who lived in Los Angeles. The social worker contacted Kathy to discuss Father's situation and the possibility of Mother, Father, and T.W. staying with Kathy upon T.W.'s release from the hospital.

Mother stated her mother and grandmother were deceased, and therefore she did not have anyone from whom to inquire about her American Indian ancestry. However, in describing her family, Mother stated she was close to her sibling, but not her father. The record does not reflect any investigation by the Department of Mother's and Father's relatives, other than its interview of Father's sister. The Department requested in its report the court make a "critical" finding that ICWA did not apply.

D. *The Jurisdiction and Disposition Hearing*

At the November 15, 2017 jurisdiction hearing,[4] the juvenile court found T.W. to be a dependent child of the court under section 300, subdivisions (b)(1), and (j). The court sustained the allegations as to Mother in counts b-1, b-2, and j-1 and dismissed the remaining counts. At the January 17, 2018 disposition hearing,[5] the Department requested the court find ICWA did not apply. The court did not inquire further of the Department, Mother, or Father, instead finding without explanation "it ha[d] no reason to believe that ICWA applies to either parent, and so ICWA does not apply to this case."

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[4] Judge Arakaki.

[5] Judge D. Brett Bianco presided over this and subsequent hearings.

Neither Mother nor Father raised any issues concerning ICWA. The court did not order notice to any tribe or the Bureau of Indian Affairs.

E. *The Permanency Planning Hearing*

After terminating reunification services on August 15, 2018, the permanency planning hearing (§ 366.26) was held on January 8, 2019. The juvenile court found by clear and convincing evidence T.W. was adoptable, and no exception to adoption applied. The court terminated Mother's and Father's parental rights. Mother timely appealed.

F. *The Permanency Planning Review Hearing*

At the February 13, 2019 permanency planning review hearing, the court ordered adoption as the permanent plan, with the goal to achieve the plan by August 14, 2019.[6] The court set the matter for a further permanency planning review hearing on August 14.

G. *The Juvenile Court's May 31, 2019 Order*

On May 31, 2019 the juvenile court issued an order acknowledging Mother's appeal and the Department's concession it had performed an inadequate investigation of the parents' Cherokee ancestry.[7] The court ordered the

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[6] On our own motion we augment the record to include the February 13, 2019 minute order. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

[7] On June 12, 2019 we took judicial notice of the juvenile court's May 31, 2019 order.

Department "to immediately begin investigating mother's and father's possible American Indian Heritage" by:

"1. Making all efforts to interview mother, father, the maternal grandfather, mother's siblings, all other known maternal relatives, including those residing in Sacramento, California, and all known paternal aunts (including father's sisters 'Kathy' or 'Cathy,' Pamela, and Regina referenced in DCFS's reports) and other paternal relatives, with regard to the family's lineage and affiliation with the Cherokee tribe(s) and any other Native American tribe(s).

"2. Prepare a detailed report regarding DCFS's attempts to interview all available relatives, what the relatives reported regarding possible American Indian heritage, exactly which relatives they believe may have had American Indian heritage, and why mother and father believe they have Cherokee heritage.

"3. If it is determined that notice pursuant to the ICWA is required, it shall not be sent until the remittitur from the appeal has been issued and counsel for the parents has been re-appointed to review the results of DCFS's investigation and any notice to be sent pursuant to the ICWA."[8]

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[8] It is not clear from the record why the juvenile court ordered notice under ICWA not be sent out until the remittitur is issued. Unfortunately, to the extent notice is required, this may further delay implementation of a permanent plan for T.W.

DISCUSSION

A. *ICWA Inquiry and Notice Requirements*

Mother contends, the Department concedes, and we agree the Department failed to conduct a complete inquiry into Mother's and Father's American Indian ancestry. ICWA provides as to dependency proceedings, "[W]here the court knows or has reason to know that an Indian child is involved, the party seeking . . . termination of parental rights to . . . an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a); see *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 784 (*Elizabeth M.*); *In re Breanna S.* (2017) 8 Cal.App.5th 636, 649.) California law similarly requires notice to the Indian tribe and the parent, legal guardian, or Indian custodian if the court or the Department "knows or has reason to know" the proceeding concerns an Indian child. (Welf. & Inst. Code, § 224.3, subd. (a); see *Elizabeth M.*, at p. 784; *In re Breanna S.*, at p. 649; Cal. Rules of Court, rule 5.481(b)(1) [notice required "[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," including dependency cases filed under § 300].)

ICWA's notice requirement is at the heart of ICWA because it "enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding. No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives the required notice." (*In*

re Isaiah W. (2016) 1 Cal.5th 1, 5; accord, *In re E.H.* (2018) 26 Cal.App.5th 1058, 1068; *Elizabeth M., supra*, 19 Cal.App.5th at p. 784.)

Under ICWA, the Department has an obligation to investigate a child's potential American Indian ancestry where it has information suggesting the child is a member of a tribe or eligible for membership in a tribe. As we explained in *Elizabeth M.*, "California law, which incorporates and enhances ICWA's requirements, identifies the circumstances that may constitute reason to know the child is an Indian child as including, without limitation, when a person having an interest in the child, including a member of the child's extended family, 'provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents or great-grandparents are or were a member of a tribe.'" (*Elizabeth M., supra*, 19 Cal.App.5th at p. 784, fn. omitted, quoting § 224.3, former subd. (b)(1); accord, *In re E.H., supra*, 26 Cal.App.5th at p. 1068.) "[O]nce the agency or its social worker has reason to know an Indian child may be involved, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility." (*Elizabeth M.*, at p. 785, citing § 224.3, former subd. (c); accord, *In re E.H.*, at p. 1068.) The duty to develop the information concerning whether the child is an Indian child rests with the court and the Department, not the parents or members of the parents' family. (*Elizabeth M.*, at p. 784.)

Notice under ICWA must include, "[i]f known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child . . . ." (25 C.F.R. § 23.111(d)(3) (2019); see Welf. & Inst. Code, § 224.3, subd. (a)(5)(C) [Notice must include "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, . . . as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known."].)

B. *The Department Did Not Adequately Investigate the Parents' American Indian Ancestry, and the Trial Court Failed To Ensure Compliance with ICWA*

Here, both Mother and Father stated on their parental notification of Indian status forms they "may have Indian ancestry," or T.W. may be a member of or eligible for membership in a tribe, and listed the Cherokee tribe. The juvenile court properly ordered the Department to investigate the parents' ancestry. But the Department only interviewed one of Father's three sisters, who had no information on her potential American Indian ancestry.

The June 1, 2017 detention report and August 1, 2017 jurisdiction and disposition report stated Father had three sisters, Pamela, Regina, and Kathy.[9] Indeed, the Department had repeated contact with Kathy, who was considered for the purpose of providing Mother, Father, and T.W. a place to live,

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[9] It is not clear from the record whether the sister the Department interviewed was one of the three sisters named by Father.

but the Department never asked Kathy whether she believed she had American Indian ancestry. The Department did not interview Father's other sisters. Nor did the Department interview Mother's sibling or father, who were identified in the jurisdiction and disposition report.

Notwithstanding Mother's and Father's statements they may have Cherokee ancestry and the Department's failure to inquire of multiple identified family members, the Department inexplicably requested in the jurisdiction and disposition report and at the disposition hearing that the juvenile court find ICWA did not apply. The juvenile court failed to inquire further at the hearing as to the Department's investigation of possible American Indian ancestry, instead finding the court "ha[d] no reason to believe that ICWA applies to either parent, and so ICWA does not apply to this case."

The Department had reason to believe ICWA applied. Both parents indicated they may have American Indian ancestry. Yet the Department did not interview their family members, except one of Father's sisters, to determine whether this belief was well founded. Although the juvenile court four months later corrected this error and ordered the Department to conduct a complete investigation, it took Mother's appeal to correct the error. Further, the almost two-year delay since the June 1, 2017 order requiring the Department to investigate means two-year old T.W. will have to wait longer for the permanency to which he is entitled.

Once the Department had reason to believe T.W. could be an Indian child (when it received the parents' parental notification of Indian status forms dated June 1, 2017), the Department had an obligation to make "further inquiry as soon

as practicable by," inter alia, "[i]nterviewing the parents, Indian custodian, and 'extended family members' . . . to gather the information" required to prepare the ICWA notices. (Cal. Rules of Court, rule 5.481(a)(4).) The Department did not fulfill this obligation, nor did the juvenile court carry out its duty to ensure ICWA compliance. (See 25 U.S.C. § 1912(a) ["No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . ."]; Welf. & Inst. Code, § 224.3, subd. (d) [same]; Cal. Rules of Court, rule 5.482(a)(1) [same].)

We reverse the order terminating parental rights and remand for the juvenile court to ensure the Department has thoroughly investigated whether T.W. has American Indian ancestry, as ordered by the juvenile court on May 31, 2019, and as necessary based on that investigation, to send proper notices consistent with the requirements of ICWA (25 U.S.C. § 1912(a)), Welfare and Institutions Code section 224.3, subdivision (a), and California Rules of Court, rule 5.481(b). (*In re E.H., supra*, 26 Cal.App.5th at p. 1075 ["The judgment terminating [m]other's parental rights is reversed for the limited purpose of providing additional proper ICWA notice to the [tribe]."]; *In re A.G.* (2012) 204 Cal.App.4th 1390, 1401-1402 [reversing order terminating father's parental rights and ordering Department to obtain complete information for paternal relatives and provide corrected ICWA notice to tribes].)[10]

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[10] Although Mother requests we order the Department to provide notice to the Cherokee tribes, the determination of whether notice should be mailed to the tribes should be made

If the Department sends notices under ICWA, and the juvenile court determines T.W. is an Indian child and ICWA applies to these proceedings, the juvenile court must conduct a new section 366.26 hearing and any further necessary proceedings, in compliance with ICWA and related California law. If not, the court shall reinstate the original section 366.26 order. (See *In re E.H., supra*, 26 Cal.App.5th at pp. 1075-1076; *In re A.G., supra*, 204 Cal.App.4th at p. 1402.)

DISPOSITION

The order terminating Mother's parental rights under section 366.26 is conditionally reversed, and the matter is remanded to the juvenile court with directions for the juvenile court to ensure the Department has thoroughly investigated whether T.W. has American Indian ancestry, as ordered by the juvenile court on May 31, 2019, and as necessary based on that investigation, to send proper notices consistent with the requirements of ICWA (25 U.S.C. § 1912(a)), Welfare and Institutions Code section 224.3, subdivision (a), and California Rules of Court, rule 5.481(b). If the juvenile court determines T.W. is an Indian child and ICWA applies to these proceedings, the juvenile court must conduct a new section 366.26 hearing and any necessary further proceedings, in compliance with

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after the Department completes its investigation. (See *In re Michael V.* (2016) 3 Cal.App.5th 225, 234-235 [mother's statement she was told by social worker that maternal grandmother was "full-blooded Indian" did not trigger notice provision, but Department had duty to investigate ancestry further].)

ICWA and California law. If not, the court shall reinstate the section 366.26 order.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.